DEPARTMENT OF STATE REVENUE

Letter of Findings: 04-20130292
Gross Retail Tax
For the Years 2009 and 2012

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ISSUE

I. Automobile Purchases – Gross Retail Tax.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-4-1(b); IC § 6-2.5-4-1(c); Gregory v. Helvering, 293 U.S. 465 (1935); Lee v. Comm'r, 155 F.3d 584 (2d Cir. 1998); Horn v. Comm'r, 968 F.2d 1229 (D.C. Cir. 1992); Comm'r v. Transp. Trading & Terminal Corp., 176 F.2d 570 (2d Cir. 1949); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Rhoade v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); 45 IAC 2.2-3-4.

Taxpayers argue they do not owe sales/use tax on the purchase of two automobiles.

STATEMENT OF FACTS

Taxpayers are Indiana residents who purchased two automobiles during 2009 and 2012. The Department of Revenue ("Department") assessed sales/use tax on the purchase price of each vehicle. Taxpayers disagreed with the assessments and submitted a protest to that effect. An administrative hearing was scheduled in order to provide Taxpayers the opportunity to fully explain the basis for their protest. Taxpayers chose not to take part in the hearing but requested that their written documentation be reviewed and form the basis for this decision. This Letter of Findings results.

I. Automobile Purchases – Gross Retail Tax.

DISCUSSION

Taxpayers argue that the Department's assessment of sales/use tax on the purchase of two automobiles was erroneous. Taxpayers set out various arguments including "insufficiency of evidence," "abuses of due process," and that the assessments violate the constitutional sovereignty of both Louisiana and Montana.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b).

Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See Rhoade v. Indiana Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. Id.; USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466, 468–69 (Ind. Tax Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. Rhoade, 774 N.E.2d at 1048. A taxable retail transaction occurs when: (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b), (c); IC § 6-2.5-3-2(a).

Therefore, when tangible personal property is acquired in a retail transaction and is stored, used, or consumed in Indiana, Indiana use tax is due if sales tax has not been paid at the point of purchase. As explained in 45 IAC 2.2-3-4:

> Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

In reviewing Taxpayers' protest, it is appropriate to point out that it is the Taxpayers' responsibility to establish that the pending tax assessments are incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square

Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Taxpayers freely admit in writing that, the vehicles are used in Indiana but argue that the two vehicles were actually purchased by Taxpayers' Montana based Limited Liability Company. Taxpayers are or were the LLC's managers. A Montana "Services Company" assisted Taxpayers in establishing their LLC. The "Services Company" invites its prospective customers – such as Taxpayers – to "Register your vehicles in Montana and Pay **No Sales Tax."** (**Emphasis in original**). The "Services Company" invites its customers to "Incorporate your Limited Liability Company in tax-free Montana and our experienced Registered Agents can help you save thousands on RV, car, and airplane registered simply with a Montana LLC." In apparent response to "Service Company's" invitation, a one-page document was prepared designating "Service Company" as the LLC's Montana "agent."

Other than the purchase of the vehicles, Taxpayer was unable to provide any documentation or evidence establishing any business or non-business activity by the LLC in Indiana, Montana, or any other state in the union. While the LLC made no attempt to undertake any further activity, the titling of the vehicles by the LLC did have an effect on Taxpayer's sales/use tax responsibility. This tax avoidance effect leads to consideration of the "sham transaction" doctrine, which is long established both in state and federal tax jurisprudence dating back to Gregory v. Helvering, 293 U.S. 465 (1935). In that case, the Court held that in order to qualify for favorable tax treatment, a corporate reorganization must be motivated by the furtherance of a legitimate corporate business purpose. Id. at 469. A corporate business activity undertaken merely for the purpose of avoiding taxes was without substance and "[T]o hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." Id. at 470.

The courts have subsequently held that "in construing words of a tax statute which describe [any] commercial transactions [the court is] to understand them to refer to transactions entered upon for commercial or industrial purposes and not to include transactions entered upon for no other motive but to escape taxation." Comm'r v. Transp. Trading & Terminal Corp., 176 F.2d 570, 572 (2d Cir. 1949), cert. denied, 338 U.S. 955 (1950). "[T]ransactions that are invalidated by the [sham transaction] doctrine are those motivated by nothing other than the taxpayer's desire to secure the attached tax benefit" but are devoid of any economic substance. Horn v. Comm'r, 968 F.2d 1229, 1236 (D.C. Cir. 1992). In determining whether a business transaction was an economic sham, two factors can be considered; "(1) did the transaction have a reasonable prospect, ex ante, for economic gain (profit), and (2) was the transaction undertaken for a business purpose other than the tax benefits?" Id. at 1237. The question of whether or not a transaction is a sham, for purposes of the doctrine, is primarily a factual one. Lee v. Comm'r, 155 F.3d 584, 586 (2d Cir. 1998).

In this case, the Montana LLC had no business or non-business functions and never attempted to acquire, maintain, or dispose of any property other than vehicles in question. In fact, the LLC had no apparent functions of any kind other than those directly related to the purchase of the vehicles in question. The titling of the vehicles in Montana, a state without a sales tax, was an apparent attempt – as publicly advertised by "Services Company" – to reduce or eliminate Taxpayers' sales and use tax liabilities. The formation of the LLC and the titling of the vehicles in the name of the LLC constituted a "sham transaction."

In conclusion, there is no apparent indication that the LLC had any valid function beyond avoiding sales and use taxes on the purchase of the vehicles. Therefore, the formation of the LLC and the titling of the vehicles by the LLC constituted a legal sham transaction. Consequently, Taxpayer acquired tangible personal property in a retail transaction, used and stored it in Indiana, but did not pay sales tax at the point of purchase or anywhere else.

In such circumstances, Indiana use tax is due as provided under 45 IAC 2.2-3-4.

FINDING

Taxpayers' protest is denied.

Posted: 09/25/2013 by Legislative Services Agency

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